Dang Chooi Ping v Lim Eng Kok

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24–188–11 OF 2011
YEOH WEE SIAM J
3 MAY 2012

Family Law — Custody — Care and control — Whether father should have custody, care and control of children — Whether mother's history of physically and mentally abusing children rebutted presumption that it was better for them to be with her — Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 — Whether children feared mother — Whether their welfare and best interests dictated they continue living with their father

Pending the filing of a divorce petition, the plaintiff wife filed an originating summons ('OS') seeking, inter alia, an interim order for custody, care and control of her two sons, aged five years and four years; that her husband ('the defendant') be given right of limited access to them; that he pay RM2,000 interim monthly maintenance for the children and that he be injuncted from going near the plaintiff and the children to commit aggressive acts. Prior to the hearing of the OS, the High Court gave interim custody, care and control of the children to the defendant and granted the plaintiff supervised access to them. In the hearing of the OS the court discovered that contrary to the several allegations made by the plaintiff against the defendant, the affidavit evidence — which included reports from a doctor and a psychiatrist and a police report made by the defendant — and the judge's own interviews of the children showed that the children were fearful of the plaintiff who used to physically and mentally abuse them. The children preferred to live with the defendant.

Held:

(1) The court was satisfied the welfare and best interests of the children would be safeguarded if they were allowed to continue living with the defendant. It would be wrong for the court to force them to live with their mother when they were so fearful of her and they were absolutely sure they only wanted to live with their father (see para 42).

(2) The rebuttable presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act 1976, that it was for the good of a child below the age of seven years to be with his or her mother, had been rebutted. The plaintiff had physically abused the children in multiple forms. She was unfit to have custody, care and control of them. At this point, when the children felt vulnerable and fearful of their mother, it was undesirable to disturb

their lives by transferring them from the defendant's interim custody to the plaintiff. That would be detrimental to their welfare (see para 44).

(3) Supervised access was ordered because the children were fearful of being alone with the plaintiff during access. It would ensure they would not be physically abused again by the plaintiff during access (see para 45).

[Bahasa Malaysia summary

Sementara menunggu pemfailan petisyen penceraian, plaintif memfailkan saman pemula ('SP') memohon, antara lain, penjagaan dan kawalan terhadap kedua-dua anak lelakinya yang berumur lima dan empat tahun; suaminya ('defendan') diberi hak akses yang terhad kepada mereka; bahawa dia membayar RM2,000 penyelenggaraan bulanan interim untuk kanak-kanak tersebut dan bahawa dia akan diinjunksi daripada menghampiri plaintif dan kanak-kanak untuk melakukan tindakan agresif. Sebelum pendengaran SP tersebut, Mahkamah Tinggi memberi penjagaan dan kawalan interim kanak-kanak tersebut kepada defendan dan memberikan kepada plaintif akses pengawasan kepada mereka. Dalam pendengaran SP tersebut mahkamah mendapati bahawa bertentangan beberapa tuduhan yang dibuat oleh plaintif terhadap defendan, keterangan afidavit — yang mana termasuk laporan daripada doktor dan psikiatri dan laporan polis yang dibuat oleh defendan — dan temuduga dengan kanak-kanak oleh hakim sendiri menunjukkan bahawa kanak-kanak takut kepada plaintif yang pernah secara fizikal dan mental menganiaya mereka. Kanak-kanak tersebut lebih suka tinggal dengan defendan.

Diputuskan:

(1) Mahkamah berpuas hati kebajikan dan kepentingan terbaik kanak-kanak akan dilindungi jika mereka dibenarkan terus tinggal dengan defendan. Adalah salah jika mahkamah memaksa mereka untuk tinggal bersama ibu mereka apabila mereka takut terhadapnya dan mereka benar-benar yakin yang mereka hanya hendak tinggal bersama ayah mereka (lihat perenggan 42).

(2) Anggapan yang boleh dipatahkan dalam s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976, bahawa adalah untuk kebaikan kanak-kanak di bawah umur tujuh tahun untuk tinggal dengan ibunya, telah dipatahkan. Plaintif telah secara fizikal menganiaya kanak-kanak tersebut dalam pelbagai bentuk. Dia tidak layak untuk mempunyai penjagaan dan kawalan ke atas mereka. Pada peringkat ini, apabila kanak-kanak tidak berdaya dan takut kepada ibu mereka, adalah tidak patut untuk mengganggu kehidupan mereka dengan memindahkan mereka daripada penjagaan interim defendan kepada plaintif. Ia akan memudaratkan kebajikan mereka (lihat perenggan 44).

(3) Akses pengawasan diperintahkan kerana kanak-kanak takut bersendirian

dengan plaintif semasa akses. Ini akan memastikan mereka tidak akan dianiaya secara fizikal oleh plaintif semasa akses (lihat perenggan 45).]

Notes

For cases on care and custody, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3534–3542.

Cases referred to

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721, CA (refd)

Mahabir Prasad v Mahabir Prasad [1981] 2 MLJ 326; [1981] CLJ 65, FC (refd)

Shyam Ishta Puthucheary v Rajveer Singh Dhaliwal [2011] MLJU 390; [2011] 5 CLJ 310, HC (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88, 88(2), (3), 96

KL Chang (Chang & Partners) for the plaintiff.
M Vickneswary (V Manickam & Partners) for the defendant.

Yeoh Wee Siam J:

[1] This is my judgment regarding the originating summons filed by the plaintiff wife ('the plaintiff') in encl 1 for the following prayers:

(a) pending the hearing of the divorce petition to be filed, an interim order for custody, care and control of two sons, namely, LJL, five years old (date of birth: 22 May 2006) ('the first child'), and LJS, four years old (date of birth: 24 August 2007) ('the second child') ('the children');

(b) the defendant be given the right of limited access to the children on alternate Saturdays from 1pm–7pm;

(c) the defendant to pay the sum of RM2,000 as interim maintenance for the children on or before the first day of every month commencing from 1 December 2011;

(d) the defendant, his employees and agents be restrained by an injunction from going near to the plaintiff and the children to commit aggressive acts;

(e) if required, that a date be fixed for inter partes hearing of this application;

(f) costs to be borne fully by the plaintiff; and

(g) further order and/or relief which this honourable court deems fit and proper.

[2] The originating summons was heard inter partes on 28 March 2012 and I gave the following decision:

Prayer 1: not allowed. Instead, I ordered that custody, care and control of the children be given to the defendant husband ('the defendant');

Prayer 2: not allowed. Instead, I ordered that reasonable access to the children be given to the plaintiff on alternate Saturdays from 1pm–7pm access is to be supervised by the defendant, his mother or sister;

Prayer 3: the defendant is ordered to maintain the children until further order;

Prayer 4: not allowed (since it is no longer necessary in view of my decision for prayer 1);

Prayer 5: no order (since it is no longer relevant); and

Prayer 6: costs are to be borne by the respective parties.

REASONS FOR MY DECISION

[3] Briefly, the facts are that the plaintiff and defendant were married in 2005. The defendant is the regional manager of Plenitude Sdn Bhd and the plaintiff is the assistant finance manager in Itramas Technology Sdn Bhd. The defendant is 19 years older than the plaintiff who is 37 years old. They have tow sons, ages 5 1/2 and 4 1/2 years. The defendant used to work in Dubai from October 2007 to May 2011. The defendant would come home once every three months to visit his family and stay for about ten days to three weeks. The relationship between the parties deteriorated after November 2007. The defendant complained that the plaintiff is hot-tempered and did not allow the children to spend time with his parents and sister. The defendant had always suspected that the plaintiff had abused his two sons, but he was not sure until the first child and the child's paternal aunt complained to him about it.

[4] Pending the hearing of encl 1, I had given an interim order dated 5 January 2012 for interim custody, care and control of the children to the defendant. The plaintiff was given supervised access initially on Saturday (as agreed to by both parties), and subsequently on Sundays from 9am–12 noon at McDonald's.

[5] Section 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') provides as follows:

88 Power for court to make order for custody

(1) The court may at any time by order place a child in the custody of his or

her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard —

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

[6] In this case the, two children are of ages five and four years respectively, and under the rebuttable presumption in s 88(3) of the LRA, it is for the good of these children to be with their mother, the plaintiff.

[7] In accordance with s 88(2) of the LRA, my paramount consideration is the welfare of the children (see also *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326; [1981] CLJ 65 (FC), *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721 and *Shyam Ishta Puthucheary v Rajveer Singh Dhaliwal* [2011] MLJU 390; [2011] 5 CLJ 310).

[8] In deciding in whose custody the children should be placed, I had regard to:

(a) the wishes of the parents; and

(b) the wishes of the children.

[9] In her affidavit in support of the originating summons (encl 2), the plaintiff averred that on 11 November 2011 when she went to her mother-in-law's house to take the children as usual, she was prevented from doing so. She further averred that the marriage could not be saved due to the physical and mental abuse by the defendant. She stated that the defendant is a gambler and used to gamble for about RM5,000–RM7,000 per month. The plaintiff stated that the children need their mother's love in view of their young age.

[10] On the other hand, the defendant averred that the first child was fearful to go home to the mother. The first child informed the defendant that he was abused by the plaintiff. The first child had been referred to a child specialist, and also to a psychiatrist, Dr Kasmini Kassim, who gave a medical report that the plaintiff should be given limited supervised access.

[11] The defendant stated that the second child did not know how to write or speak well. The child specialist had diagnosed the second child as having an attention deficit disorder and had to be treated with 'neurogain'.

[12] On 11 August 2010 the defendant was informed by his sister of the cane marks on the right and left hands of the first child (see exh LEK5(a)–(c) of defendant's affidavit affirmed on 16 January 2012).

[13] On 23 May 2011 the first child complained that the right part of his neck was painful because he was kicked by the plaintiff.

[14] On 7 August 2011 the defendant was informed by both children that they were beaten by the plaintiff for unimportant matters and on unreasonable grounds.

[15] According to the defendant, on 25 October 2011 the plaintiff caned the children because they ate sweets. The children were punished by having to kneel on the floor until the defendant came home.

[16] On one occasion, the defendant also noticed injuries on the first child's face, below the eyebrows and on his lips. The first child informed the defendant that he was punished by the plaintiff for not eating his food (see photographs at exh LEK7(a)–(b)).

[17] The defendant further stated that on 11 November 2011 the plaintiff beat and hit the first child with a baseball bat (see exh LEKQ (a)–(c)).

[18] The defendant's police report dated 12 November 2011 exhibited in his affidavit in reply affirmed on 16 January 2012 gave details of the plaintiff's acts of physical aggression towards the two children. The defendant lodged the police report upon the advice of Dato' Dr Musa Mohd Nordin, the consultant paediatrician at KPJ Damansara Specialist Hospital, after the doctor had examined the injuries on the first child and found a bruise over the left wrist and recommended psychiatric counselling for the child (see exh LEK1– 2(a)).

[19] On 13 December 2012 the second child informed the defendant that the plaintiff beat him.

[20] The defendant averred that the first child has been treated by Dr Subash Kumar Pillai ('Dr Subash') of the University Malaya Specialist Centre (see exh LEK1 of the defendant's further affidavit affirmed on 16 March 2012 in encl 16).

[21] Dr Kasmini Kassim's report dated 29 November 2011 states, inter alia, that she examined the first child twice and required more examination later, but in view of the facts which show that the first child was physically and mentally abused, she was of the opinion that in the interest and the welfare of the child that an interim protection order ('IPO') must be given to the father of the child ie the defendant in order to take care of the patient first ie child.

[22] In her medical report dated 13 December 2011 on the second child, Dr Kasmini Kassim also suggested that the second child be placed under the IPO in the interest and welfare of the second child.

[23] The defendant maintained that whatever the first child told Dr Kasmini that he was beaten by the plaintiff is similar to whatever the first child had told Dr Subash.

[24] In Dr Subash's medical report dated 16 January 2012 (exh LEK1 of encl 16) on the first child, the doctor described the various acts of abuse by the plaintiff that the first child told him. I find that the contents of this medical report regarding what the first child told the doctor is consistent with what the defendant had stated in his affidavits, and what the first child had informed me during my two interviews of him.

[25] The plaintiff denied beating or abusing the children. She averred that the defendant had screamed and beaten the children before, and he liked to use harsh words or the 'f' language. However, there is no evidence on this. Neither did the children, in my two interviews of them, make any such allegations.

[26] The plaintiff denied that the second child has attention deficit disorder but she admitted that he is a slow learner.

[27] The plaintiff admitted that the first child had an infection and had rashes in his groin areas.

[28] The plaintiff complained that during her interim access of the children, the defendant recorded the access for two hours.

[29] According to the defendant, on 25 November 2011 the first child told him that he wanted to go and tell the judge that he did not wish to live with his mother because she used to beat him.

[30] The defendant averred that the plaintiff is also a gambler with a 'gold member' card at Genting Highlands. She was usually more interested in watching TV than taking care of the children.

[31] The wishes of the parents regarding custody are clear to the court, as can be seen from their respective affidavits.

[32] In order to ascertain the wishes of the children, I decided to interview the two children even though they are only 5 1/2 years old and 4 1/2 years old respectively.

[33] I interviewed the children individually for the first time on 5 January 2012. Subsequently, on the request of the plaintiff, I interviewed the children individually for a second time on 28 March 2012 ie just before the hearing of encl 1. As applied for by counsel for the plaintiff, before the second interview, I allowed the plaintiff some time to see the two children and bond with her, considering that the children were then under the interim custody, care and control of the defendant.

[34] I find the two children to be confident and articulate. They are cheerful, lively and intelligent. I am satisfied that even though they are very young, they can express their independent opinions clearly on their respective wishes.

[35] In the two interviews, the children were consistent in expressing their wishes that they only wish to live with their father because their father is kind to them and does not beat them. They prefer not to live with their mother or see her everyday, weekly or monthly or even spend half their school holidays with her. Both children informed me that the plaintiff frequently beat them.

[36] According to the two children, the plaintiff had often physically abused them in various ways eg beating the first child with a cane or baseball bat, using her thumb and index finger to flick at the tongue, lower lip or area just below the eye, or poking or jabbing hard at the various parts of the body with her fingers. Both children repeatedly told me that they only love their father and are very happy now to be with their father.

[37] The plaintiff alleged that the defendant had alienated the two children from her. Only the parties would know the truth about this. However, what is important to consider at this stage is that both children do not wish to live with their mother, and I took their wishes into account as well.

[38] When I asked the first child to explain why he looked happy in the video recording dated 17 March 2012 exhibited by the plaintiff for the hearing, he

said that he looked happy because he was told to do so by the plaintiff, and to do everything as recorded by the plaintiff eg playing, looking straight into the camera and looking as if he was having a good time during access by the mother. He said that in the video the plaintiff looked kind because she wanted him to go back to her, but she was pretending.

[39] The second child informed me that in the video recording done by the plaintiff during access, he was sitting on his mother's lap and she was reading to him, but he is still not happy with her because she used to beat him frequently.

[40] The plaintiff also exhibited a video recording of her access on 7 January 2012 to show that the first child was scared of the father. From this exhibit ie the photo and videos 1–8, there is no convincing or conclusive evidence that the first child is fearful of the father.

[41] Both children expressed a fear to go back to the plaintiff. They are happy with their kindergarten and like it there. They are happy living with the defendant, and their paternal grandmother and aunt who cook for them. The children wish to continue living with their father and do not wish to spend time overnight with the plaintiff.

[42] Going by the evidence and the outcome of the court's interviews of the children, I am satisfied that the welfare and bests interests of the children would be safeguarded if they are allowed to continue living with their father, the defendant. It would be wrong for the court to force them to live with their mother when they are so fearful of her, and they are absolutely sure that they only want to live with their father.

[43] I find that what the children informed me is consistent with the defendant's evidence of the frequent beatings of the children by the plaintiff.

[44] Base on the above, I am satisfied that the rebuttable presumption in s 88(3) of the LRA has been rebutted. In this case, the plaintiff has physically abused the children in multiple forms, which a loving and good mother would not do. I find that she is an unfit parent to have custody, care and control of the children. I am of the opinion that the more suitable or better parent to have custody, care and control of the children is, without doubt, the defendant. In my view, at this point when the children feel so vulnerable and are fearful of their mother, it is undesirable to disturb their lives by transferring them from the interim custody of the defendant to the plaintiff. That would be detrimental to the welfare of the children.

[45] I further ordered supervised access because the children are fearful to be

alone with the plaintiff during access. This is to ensure that the children would not be physically abused again by the plaintiff during access.

[46] Even though the plaintiff applied for interim custody, care and control of the children pending the filing and hearing of a divorce petition, when this court made the order on encl 1 of the originating summons, it is a final order until such time as it is revoked. Once matrimonial proceedings are filed, until the children attain the age of 18 years, any order on custody and access can be varied by the court if there is proof of a material change in circumstances (see s 96 of the LRA).

[47] For the above reasons, I therefore ordered accordingly.

Order accordingly.

Reported by Ashok Kumar